Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	
Rules to Preempt State and Local	)	RM - 8577
Regulation of Tower Siting for	)	
Commercial Mobile Services Providers	)	

To: The Commission

COMMENTS
OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA")/[1], by its attorneys, in response to the Public Notice Report No. 2052, *(released January 18, 1995)*, herewith submits its Comments in the above-referenced proceeding.

I. Introduction

The matters raised in this proceeding are of great interest to PCIA's broad membership, which includes paging and

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[1] PCIA is the consolidation of Personal Communications Industry Association and the National Association of Business and Educational Radio ("NABER"). PCIA is an international trade association created to represent the interests of both commercial mobile radio service (CMRS) and private mobile radio service (PMRS) users and businesses involved in all facets of the personal communications industry. PCIA's federation of Councils include: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association ("SOMA"), the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, PCIA is the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, 800 MHz General Category frequencies for Business eligibles and conventional SMR systems, and for the 929 MHz paging frequencies.

narrowband PCS providers, broadband PCS applicants, SMR operators, site owners and managers/[2], private system users, wireless system integrators and technicians.

On December 22, 1994, the Cellular Telecommunications Industry Association ("CTIA") filed a Petition for Rule Making ("CTIA Petition") requesting that the FCC preempt state and local governments from enforcing zoning and other similar regulations which have the purpose or effect of barring or impeding commercial mobile radio service ("CMRS") providers from locating and constructing new towers.

CTIA argues that §332 of the Communications Act represents the culmination of congressional efforts to foster the competitive development of mobile services. Thus, §332 prohibits states from regulating entry into mobile services, regardless of whether such regulations create partial or complete barriers, whether direct or indirect. *See, CTIA Petition at page 3.* Since Section 332 of the Communications Act requires that the FCC, in managing mobile services, consider whether its actions improve spectrum efficiency, reduce regulatory burden and encourage competition and services to the largest feasible number of users, CTIA argues

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[2] SOMA was founded by NABER in 1993 to advance the profession of communications site management through education, increased public awareness and the promotion of fair and equitable regulatory and legislative standards. SOMA members constitute site owners and managers maintaining and/or operating tower site locations throughout the United States. SOMA's broad membership includes over 75 communications companies, located in more than 32 States, and the District of Columbia. SOMA's member site owners and managers are involved in a wide variety of communications services, such as cellular, paging, special mobilized radio, and broadcast.

that, state and local zoning actions that thwart these goals are at odds with the statutory mandate. *See, CTIA Petition at page 4.*

CTIA briefly examines the legislative history in this area, which it says confirms a very narrow reservation of state authority. CTIA examines both the House and Conference Reports, which it argues demonstrates beyond dispute that Congress intended that the mobile services marketplace function efficiently, competitively, and with a minimum of regulatory intervention. *See, CTIA Petition at page 8.* CTIA concludes that a careful examination of §332 and its legislative history demonstrates that Congress intended that the principles of competition, efficiency and regulatory parity outweigh the state's interest in zoning and other regulation. States cannot be permitted to thwart directly or indirectly through zoning and other similar regulation the full competitive build out of mobile services. *See, CTIA Petition at pages 10-17.*

PCIA agrees that an improved process for site selection is critical to all forms of the wireless industry. Millions of dollars have been spent in the design and implementation of many existing systems, and billions more dollars are being spent for the acquisition of new spectrum sources. A system must be utilized to permit those networks to be built efficiently.

For the reasons set forth below, PCIA submits these Comments in support of the issuance of a Notice of Proposed

Rule Making seeking to preempt state zoning and other regulations imposed upon CMRS provider tower sites.

II. Increased State and Local Regulations Regarding Wireless Telecommunications Systems Threaten To Undermine Federal Goals

With the development and growth of wireless services, PCIA members have encountered increased conflicts between individual state and local guidelines. The growing number of state and local regulations regarding the construction and operation of wireless communications facilities threaten to undermine federal goals of an increasingly competitive and robust commercial mobile radio service.

Our members have provided us with several relevant examples of recently proposed or enacted state and local regulations. For example, King County, Washington recently passed legislation that establishes design and operating standards for new communications facilities, as well as exposure limits to non-ionizing RF radiation. For example, King County has established setback requirements, landscaping requirements and tower color and lighting standards. Although some of these new standards do not conflict with existing federal guidelines, they unnecessarily increase the cost of doing business there -- as such procedures and standards proliferate, there will be more delays and increased costs to implement effective, wide area communications networks.

PCIA recently learned that the Town of Otisco, New York has proposed its first tower ordinance, known as "Local Law

#1 of 1994," the purpose of which shall be to set construction, erection and operational guidelines for communications towers, including specific height limitations and lighting requirements. The proposal includes a non-refundable tower registration application fee of $2,500.00, and an exhaustive list of special license eligibility requirements, including performance bonds and personal guarantees that indemnify the town. Many of these proposed regulations either duplicate or conflict with current or proposed federal guidelines.

In December 1993, the New Jersey Department of Environmental Protection and Energy ("DEPE") issued a sweeping set of proposed regulations that would require owners of mobile radio transmitters and cellular base stations to register and pay annual fees for each antenna site, antenna array, or base station, and indicated that its proposed regulations address concerns about possible health hazards related to exposure to non-ionizing RF and microwave radiation. *See, DEPE Docket No. 60-93-11/42, PRN 1993-650.* Many of the proposed regulations would frustrate current or proposed federal guidelines. Although the New Jersey DEPE eventually decided to forego registration and mandatory fees for RF energy sources from wireless communications users, the department is considering other measures for exerting state zoning authority in this area./[3]

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[3] A number of other jurisdictions have imposed zoning ordinances or restrictions regarding the emission of RF energy that differ from the RF energy requirements set by the FCC, such as (1) Jefferson County, Colorado; (2) Stamford,

As more and more states decide to enter the arena of communications regulations, federal regulations will be increasingly frustrated and compliance with conflicting regulations will become an insurmountable task for wireless telecommunications systems./[4]

PCIA has played an active role in monitoring and debating these regulatory matters. Last month PCIA participated in an industry coalition that crafted an FCC Petition for a Further Notice of Proposed Rule Making seeking a declaratory ruling for federal preemption of state and local regulation of the RF energy aspects of FCC-authorized antenna facilities to the extent such regulation is inconsistent with the FCC's own RF standards. In the past, PCIA (and former NABER) members and staff have attended and participated in meetings across the country with respect to transmitter site issues including fees and policies for telecommunication transmitter sites located on public lands, and local approval of tower siting.

As an active participant in matters relating to the CTIA Petition, PCIA strongly believes that the time is ripe for the Commission to exercise its expertise and authority in this area of regulation.

Connecticut; (3) Village of Wilmette, Illinois; (4) City of Portland, Oregon; and (5) the Commonwealth of Puerto Rico.

[4] PCIA has solicited additional examples of state and local laws or regulations affecting tower siting, and will supplement the Record in this proceeding as such additional information becomes available.

III. Preemption of State and Local Tower Site Regulations is Within the Commission's Authority

In 1977, the Commission issued a *Public Notice* entitled "Local Laws Regulating Radio May Be Pre-empted by Communications Act," 41 RR 2d 248 (released July 29, 1977). The Public Notice discussed the Commission's jurisdiction and pre-emptive authority over local regulation of radio. It offered, however, no means by which a municipality might judge whether or not a particular ordinance is unduly restrictive. The Notice indicates that "whether a particular local statute has been pre-empted by federal legislation is a question of law. For proper resolution the specific local law in question must be reviewed, and each case must be carefully judged on its own merits."

Preemption of state and local tower site regulations is within the Commission's statutory authority under the Communications Act. The Commission long ago determined that the broad mandate of Section 1 of the Communications Act, *47 U.S.C. §151*, to make communications services available to all people of the United States and the numerous powers granted by Title III of the Act with respect to the establishment of a unified communications system, establishes the existence of a congressional objective in this area. *See e.g., Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 59 RR 2d 1073 (1986); PRB-1 Declaratory Ruling - Amateur Radio Preemption, 101 FCC 2d 952 (1985).*

With respect to the Commission, the Supreme Court has recently observed that:

> The FCC has been given broad responsibilities to regulate all aspects of interstate-communications by wire or radio by virtue of §2(a) of the Communications Act of 1934, 47 U.S.C. §152(a), and the Commission's authority extends to all regulatory actions necessary to insure the achievement of the Commission's statutory responsibility. Therefore, if the FCC has resolved to pre-empt an area of valid regulation and if this determination represents a reasonable accommodation of conflicting policies that are within the agency's domain, one must conclude that all conflicting state regulations have been precluded. *Capital Cities Cable, Inc. v. Crisp, 56 RR 2d 263, 267 (U.S. Sup. Ct. 1984).*/[5]

The preemption of state laws may be justified in three ways. First, Congress may expressly exempt state law. *See, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).* Or, Congress may indicate its intent to completely occupy a given field so that any state law encompassed within that field would implicitly be preempted. Such intent could be found in a congressional regulatory scheme, such as the Communications Act *vis-a-vis* the Federal Communications Commission, that is so pervasive that it would be reasonable to assume that Congress did not intend to permit the states to supplement it. *See, Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141, 153 (1982).* Finally, preemption may be

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[5] When considering preemption, the Commission must consider two constitutional provisions. The tenth amendment provides that any powers which the constitution either does not delegate to the United States or does not prohibit the states from exercising are reserved to the states. These are the police powers of the state. The Supremacy Clause, however, provides that the constitution and the laws of the United States shall supersede any state law to the contrary. *See, Article III, Section 2.*

warranted when state law conflicts with federal law. Such conflicts may occur when "compliance with both Federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Hines v. Davidowitz, 312 U.S. 52 (1941).*

Previously the Commission has not hesitated to preempt state and local regulations in cases where such regulations frustrate federal policies./[6] Because increased local oversight over tower site construction and operations is adversely affecting a licensee's ability to engage in Commission-authorized activities, Federal Supremacy in the form of preemption must now be asserted.

Preemption is primarily a consequence of the conflict between federal and state and local regulation. To the extent state regulations supersede or contradict federal tower site regulations and guidelines, they will frustrate the achievement of uniform industry guidelines, and concomitantly make such federal guidelines meaningless. Also, of equal importance, the Commission must consider the economic hardship of complying with conflicting federal, state and local regulations -- many communications operations will expend considerable resources trying to comply with such conflicting regulations. In most cases, the expense will be passed along

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[6] See, e.g., *Louisiana Pub. Serv. Comm'n, 476 U.S. 355; American Broadcasting Co. v. FCC, 191 F. 2d 492 (D.C. Cir. 1951); Satellite Earth Stations (Preemption), supra; PRB-1 Amateur Radio Preemption, supra.*

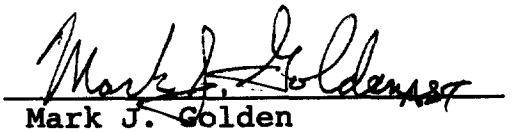
to the consumer. In other cases, the expense will suffocate the business and cause a withdrawal of service to the public. All told, conflicting regulations such as these will prohibit the long term growth of this country's communications industry.

IV. Conclusion

Based upon the foregoing, PCIA respectfully supports the issuance of a Notice of Proposed Rule Making seeking to preempt state zoning and other regulations imposed upon CMRS provider tower sites.

Respectfully submitted,

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

By: 

Mark J. Golden
Vice-President,
Industry Affairs

Of Counsel:

Meyer, Faller, Weisman & Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20554

(202) 362-1100

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CERTIFICATE OF SERVICE

I, Ruth A. Buchanan, a secretary in the law office of Meyer, Faller, Weisman and Rosenberg, P.C. hereby certify that I have on this 17th day of February, 1995 sent via first class mail, postage prepaid, a copy of the foregoing **Comments of the Personal Communications Industry Association** to the following:

Michael F. Altschul, Esquire
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Chairman Reed Hundt*
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello*
Federal Communications Commission
1919 M Street, N.W, Room 802
Washington, D.C. 20554

Commissioner Andrew C. Barrett*
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Commissioner Rachelle B. Chong*
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Susan Ness*
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Ruth A. Buchanan

*Via hand delivery